REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANESBURG

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

7 December 2021

Case No:32179/2019

In the matter between:

SOUTH AFRICAN SECURITISATION PROGRAMME (RF) LTD	First Applicant/Plaintiff
FINTECH UNDERWRITING (PTY) LTD	Second Applicant/Plaintiff
SUNLYN (PTY) LTD	Third Applicant/Plaintiff

and

LITSAMAISO (PTY) LTD	Respondent/Defendant

JUDGMENT

SK Hassim AJ

[1] In an effort to expeditiously dispose of applications enrolled on the unopposed motion court roll of 17 June 2021, I uploaded a note on Caselines indicating whether parties were required to appear at the hearing, or whether I would issue an order on the papers before me. A virtual hearing was convened to dispose of those applications in which I required oral submissions from counsel.

[2] The applicants (the plaintiffs in the action) brought an application to compel the respondent (defendant in the action) to deliver a discovery affidavit ("**the application**"). This application was enrolled in the unopposed motion court in which I presided on 17 June 2021.

[3] The applicants' counsel had uploaded onto Caselines a practice note indicating that the respondent had delivered a discovery affidavit on 10 June 2021, and therefore the applicants will move for the removal of the application from the roll and an order that the respondent pay the costs of the application on the attorney-client scale. The applicants' counsel also uploaded a draft order in these terms. This being so, I indicated in a note uploaded onto Caselines that it was not necessary for counsel to appear and that I would decide the application on the papers.

[4] Counsel for the parties appeared at the virtual hearing and informed me that the parties were unable to agree whether the respondent was liable for the costs of the application to compel discovery. The respondent's position on the issue of costs is reflected in paragraph 14 of the opposing affidavit to which I refer below:

> *"14. I submit that the Applicant is not entitled to the costs of this application. The costs must be determined at the hearing of the trial of the main matter."*

[5] The respondent filed an opposing affidavit which was uploaded onto Caselines on 17 June 2021, namely the day of the hearing, together with the respondent's counsel's practice note. I had perused neither because I had perused and prepared for the unopposed roll either the preceding day or in the early hours of 17 June 2021. I did not have the benefit of reading the papers that had been uploaded on the day of the hearing. While not ideal I requested the respondent's counsel to take me through the papers. It transpired that not only did I have to have regard to the notice in terms of rule 35(1) and the application to compel discovery, but I also had to have regard to other documents on Caselines which were not referred to in the opposing affidavit. The hearing on costs thus endured for close to an hour if not more on the afternoon of 17 June 2021.

The averments in the affidavit opposing the application to compel discovery

[6] The respondent's attorney deposed to the opposing affidavit and averred therein that the applicants were informed in a letter dated 17 February 2021 of the respondent's intention to amend its plea and to thereafter "*discover documents that are in line with [the respondent's] amended plea*". The letter recorded that in a telephonic discussion between the parties' attorneys, the respondent's attorney had proposed that the application to compel discovery which had been enrolled for hearing on 9 March 2021 should be withdrawn by the applicants to avert legal costs and that the parties should bear their own costs. The letter concluded with a request that the applicants' attorney obtain an instruction on the respondent's proposal and revert by no later than 22 February 2021. The application to compel discovery did not proceed on 9 March 2021. In the meanwhile, the respondent brought an application for leave to amend its plea because the applicants had objected to its intention to do so. The respondent was unable to obtain a date earlier than 21 July 2021 for the hearing of the application for leave to amend.

[7] The notice enrolling the application to compel discovery for hearing on 17 June 2021 was transmitted by e-mail on 28 May 2021.

[8] On 2 June 2021, the respondent's attorney in a letter informed the applicants attorney that the application to compel discovery was unnecessary because the respondent intended delivering a discovery affidavit after it had delivered an amended plea. Notwithstanding this the respondent's attorney undertook to deliver the discovery affidavit on or before 10 June 2021 and requested that the application to compel be removed from the unopposed motion court roll of 17 June 2021 to avoid unnecessary costs. The penultimate paragraph of the letter read:

> "*We will brief counsel to attend to the hearing on 17 June 2021 if the matter proceeds and advance our position as previously stated in the letter sent to you on 17th February 2021.*"

[9] On 9 June 2021, the applicants' attorney responded in the following terms:

> "*Your letter dated 2 June 2021 refers.*
>
> *I do not intend litigating by way of correspondence.*
>
> *I have already placed on record the lateness of any amendment application, that was some months ago already. And yet you have still not delivered same, I can only assume that there will be a [sic] extremely detailed condonation application, coupled with the amendment application.*
>
> *I do not intend debating the discovery issue with you, if your client's discovery affidavit is not received before the hearing, the application will proceed."*

[10] The respondent's discovery affidavit was served on 10 June 2021 under cover of a letter the penultimate paragraph of which reads as follows:

> *"4. We kindly request that you forward us a notice of withdrawal of your application in terms of Rule 35 (7) of the Uniform Rules of Court."*

[11] On 14 June 2021, the applicants' attorney, in a letter to the respondent's attorney, acknowledged receipt of the respondent's discovery affidavit. The letter reads as follows:

> *"I confirm receipt of your client's discovery affidavit on Thursday 10 June 2021, accordingly, I have instructed counsel not to persist with an order compelling discovery, but as counsel has already been briefed and the application set down the necessary costs order will be sought.".*

The defence to the application to compel

[12] The defence to the application to compel discovery is articulated in the following two paragraphs in the opposing affidavit:

"12. I… respectful [sic] submit that the Applicant's [sic]attorney was advised as early as 17 February 2021 of our client's intention to amend its plea. The Applicant's attorney was further informed as early as 02 June 2021 of our undertaking to serve our client's discovery affidavit and that he must remove the matter from the roll.

13. The Applicant's [sic] attorney despite his correspondence that if our client's discovery is not received on 10 June 2021 the matter will proceed, continued to brief counsel. Our client's discovery affidavit was served on the 10th of June 2021, as undertaken."

The argument at the hearing

[13] In view of the delivery of the answering affidavit on the morning of the hearing, no replying affidavit was delivered by the applicants. The applicants' counsel's argument was that the discovery affidavit was delivered after the application to compel had been enrolled for hearing on 17 June 2021. This, she argued, entitled the applicants to the costs of the application to compel.

[14] The respondent's counsel argued numerous issues ("**the further defenses**") that were not raised in the opposing affidavit. I list these:

(i) The service of the notice in terms of rule 35 (1) on 8 September 2020 was defective because it had been transmitted to the e-mail address of a person in the respondent's attorney's office who had passed away. The applicants' attorney was aware of this and therefore the notice was re-transmitted on 23 September 2020.

(ii) The application to compel discovery dated 10 December 2020 was defective. It is not clear whether the application is based on the notice in terms of rule

35(1) that was transmitted on 8 September 2020 or the one transmitted on 23 September 2021.[1]

(iii) The application to compel dated 10 December 2020 was defective because it had been transmitted to the incorrect e-mail addresses, one of which was the deceased person's e-mail address despite the applicants' attorney being aware of his demise. [2]The defective service therefore renders the application defective.

(iv) The application which serves before me is the application dated 10 December 2020, reflecting the date for the hearing as 9 March 2021. It was served on 5 February 2021.[3] The application did not proceed on the day and no costs order was made.

(v) Since 9 March 2021, no further work was done on the application and the only costs that were incurred related to the delivery of the notice of set down on 28 May 2021.

Analysis

[15] None of these issues are raised in the opposing affidavit. They were raised from the Bar and for this reason, may properly be disregarded (the applicant's counsel in any event protested on the same basis). Even if I am wrong in finding that these issues can properly be disregarded, the further defenses are procedural, and the respondent was entitled to invoke the provisions of rule 30. It failed to do so, and additionally delivered a

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1 Paragraph 1 of the notice of application refers to non-compliance with the notice in terms of rule 35(1) transmitted on 23 September 2020. The notices are both dated 8 September 2020 and the content of both notices is the same.

2 On the face of the application it was transmitted to esthu.mbanaanga@sgalawafrica.co.za (the address of the deceased person employed by the respondent's attorney) and siwze.gcayi@sgalawafrica.co.za. It is evident from the notice of intention to oppose application to compel that the latter e-mail address is incorrect. The e-mail to which the application ought to have been transmitted is sizwe.gcayi@sgalawafrica.co.za.

3 This application was transmitted to the correct e-mail address sizwe.gcayi@sgalawafrica.co.za even though the incorrect e-mail address is reflected on the application as being the e-mail address for electronic service.

discovery affidavit. The respondent having failed to invoke the provisions of rule 30 and having delivered a discovery affidavit cannot now complain of any irregularities assuming that there were irregularities.

[16] In any event there is no merit in the arguments. The notice in terms of rule 35(1) transmitted to the correct e-mail address on 23 September 2020 was dated 8 September 2020. It is exactly the same notice that was transmitted to the incorrect e-mail address previously.

[17] The application dated 10 December 2020 was served twice. It was transmitted by e-mail to the incorrect address in December 2020 without a date for the hearing having been inserted thereon. The application was transmitted to the correct e-mail address on 5 February 2020 with the date 9 March 2021 inserted thereon as the date of the hearing. The application referred to the notice in terms of rule 35(1) transmitted on 23 September 2020 and it was served on the correct e-mail address. The application which was enrolled for hearing on 9 March 2021 was not disposed of and was re-enrolled for hearing on 17 June 2021. It is clear from the notice of set down that the application which was being enrolled was the one served on the respondent's attorney on 5 February 2021.

[18] What then of the argument on behalf of the respondent that the applicants' attorneys' letter of 9 June 2021 constituted an agreement that the applicants would not pursue the application if the respondent's discovery affidavit was delivered prior to the hearing.

[19] I do not understand the letter to be an agreement that no costs will be sought if a discovery affidavit was delivered prior to the hearing. As I understand the letter, the applicants' attorney agreed not to seek an order compelling the respondent to deliver a discovery affidavit if one was served prior to the hearing on 17 June 2021. By 10 June 2021, the costs of drawing the application had been incurred and in the absence of an express agreement that costs were being waived by the applicants, they are entitled to the costs of the application.

[20] That then leaves the question whether it was unreasonable for the applicants' attorney to have briefed counsel for the hearing on 17 June 2021. If there was no express agreement that a costs order would not be sought by the applicants, it was necessary to brief counsel regardless of whether a discovery affidavit was delivered or not; if a discovery affidavit was delivered, then counsel would have had to move for a costs order. There was no way for the applicants' attorney to know with any certainty whether counsel will have to appear in court either physically or virtually; or whether the application will be decided on the papers as sometimes occurs in the time of the Covid-19 pandemic.

[21] I do not find it to have been unreasonable for the applicants' attorney to have briefed counsel. Accordingly, the applicants are entitled to the costs of the application to compel.

[22] This brings me to the question whether these costs should include costs on an opposed scale because the application for costs had become opposed. The respondent has failed in its opposition and should therefore be liable for costs on an opposed scale. I am however not satisfied that punitive costs are warranted.

Order

In the result the following ordered is made:

The respondent shall pay the opposed costs of the application to compel discovery.

_____

S K HASSIM AJ
Acting Judge: Gauteng Division, Johanannesbur
(electronic signature appended)
7 December 2021

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties' legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 7 December 2021.

Date of Hearing: 17 June 2021

Date of Judgment: 7 December 2021

Appearances:

For the applicant:	Adv R Putzier
For the first and second respondents:	Adv K Mvubu